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In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM M. WILCOX, JR.
Petitioner

VERSUS

TERRYTOWN FIFTH DISTRICT
VOLUNTEER FIRE DEPT., INC.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner has accurately set forth those facts which he considers important to the Court's inquiry. He ignores the historical evolution of the relationship between Jefferson Parish, a political subdivision, Fire Protection District No. 5 and Terrytown Fifth District Volunteer Fire Department, Inc. He also ignores several important features of the fire protection contract through which tax revenues are dedicated to Terrytown. Discussion of these facts is embodied in Respondent's Argument.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeal correctly determined that Terrytown Fifth District Volunteer Fire Department, Inc. ("Terrytown")[1] is an "agency of a political subdivision of a state" within the meaning of Section 3(x) of the Fair Labor Standards Act. Petitioner seeks a contrary result in this Court by insisting that the criteria for what constitutes a "political subdivision" under the National Labor Relations Act, as established in *NLRB v. Utility District of Hawkins County, Tennessee*, 402 US 600 (1971), should be used to determine what constitutes a "public agency" under the Fair Labor Standards Act. Petitioner argues that this is the approach taken by the Secretary of Labor and urges that the Secretary's interpretation is entitled to great deference.

It is submitted that the Secretary of Labor, through her administrators, has missed the mark by failing to accurately read the literal language of Section 3(x) of the Act. The Fifth Circuit carefully parsed Section 3(x) in order to point out that Section 3(x) defines "public agency" to mean not only "political subdivisions", but also any "agency of a political subdivision."

The Secretary of Labor's political subdivision test is drawn from the criteria established by this Court in *Hawkins* which was interpretive of the National Labor Relations Act. Political subdivisions are exempt from coverage under the National Labor Relations Act. They are not exempt under the Fair Labor Standards Act, and this Court has not been called upon to determine what constitutes an "...agency of a political subdivision..." within

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[1] Terrytown is a non-profit corporation organized under Louisiana Law. In accordance with Rule 29.1 of the Rules of the Supreme Court, Terrytown avers that it has no parent or subsidiary corporation.

the confines of the Fair Labor Standards Act. It is submitted that if Congress had intended for only political subdivisions to be considered public agencies, it would not have included both political subdivisions and agencies of political subdivisions in its definition of "public agency."

Terrytown is not a political subdivision, but because Terrytown performs a traditional sovereign function, that of extending fire protection and suppression services to the public, and considering that Terrytown is a non-profit organization organized for a purely public purpose and wholly supported with public funds, it is a public agency within the meaning of Section 3(x) of the Fair Labor Standards Act. Consequently, since Terrytown is a public agency engaged in fire protection and suppression activities, it is entitled to the limited overtime exemption set forth in Section 7(k) of the Act.

The legislative history of the Fair Labor Standards Amendments of 1974 illustrates congressional concern over the fiscal difficulties that would be visited upon local governments in light of the irregular work schedules of firemen and police officers if local governments were required to strictly adhere to the overtime requirements of the Fair Labor Standards Act. The congressional conferees discussed at great length the uniqueness of the fire fighting services and the need for a novel concept which would take into account the fact that fire fighters are on call at all hours of the day and night. Congress made no distinction between direct hire municipal departments performing public fire fighting services and volunteer companies providing the same services as an extension of the sovereign. Countless local governments and communities were extending fire protection to their citizenry through such mechanisms when the 1974 Amendments to the Fair Labor

Standards Act were passed. It is submitted that Congress did not intend for these local governments to abrogate their existing organizations and to put into place direct hire departments in order to come within the 7(k) exemption.

Petitioner's arguments fail because they proceed from an erroneous application of a "political subdivision" test which is not relevant to the inquiry presented by the specific statutory language of the Fair Labor Standards Act. Further, petitioner presents no rational basis for distinguishing between fire protection services delivered by local governments through volunteer agencies like Terrytown and those delivered by local government through direct hire departments.

ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

In 1974 Congress amended the Fair Labor Standards Act (FLSA) in order to extend its coverage into the public sector.[2] In expanding FLSA coverage, great concern was expressed in both the Senate and the House regarding the detrimental fiscal effect on local governments struggling to provide an appropriate level of fire and police services for their communities. Considering that policemen and firemen work irregular hours and that the FLSA requires the payment of overtime wages at 1 1/2 times the regular rate for employees working any hours in excess of 40 in a given work week, the House proposed a complete overtime exemption for policemen and firemen. To the contrary, the Senate felt that a limited overtime exemption would suffice to eliminate any hardship for local government. Finally, House and Senate conferees agreed on what became Section 7(k) of the Act.[3]

This particular section of the Act is based on a "tour of duty" concept which does not abrogate payment of overtime for policemen and firemen in its entirety. Rather, it establishes a certain number of hours which can be worked during a fixed period of time without any overtime pay becoming due. The 7(k) exemption is available only for employees of "public agencies" engaged in fire protection or law enforcement activities. Consequently, the question presented to the courts below was whether Terrytown qualified as a "public agency" for purposes of the 7(k) exemption.

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[2] Section 3(r) was amended to expand the definition of "enterprise" to include "an activity of a public agency," and the definition of "employer" was redefined to include "a public agency."

[3] 29 USC § 203(x).

Terrytown is engaged in extending fire protection and suppression services to the community of citizens residing within the politically established boundaries of a geographical area known as Fire Protection District No. 5. Fire Protection District No. 5 was created by an ordinance of the Jefferson Parish Council passed on August 13, 1959. There is no dispute that Jefferson Parish is a political subdivision of the State of Louisiana.

Prior to creation of Fire Protection District No. 5, no governmental fire protection services were extended to the citizens of the Terrytown area, the only services available being those delivered at the time by volunteer fire fighters. With creation of Fire Protection District No. 5, local government accepted that it had a duty, as sovereign, to provide fire protection and suppression services to the public and commenced to discharge that duty.

At this historical juncture, Jefferson Parish had the choice of starting a brand new fire department, from scratch, or of adopting and maintaining the Terrytown infrastructure which was already in place. Jefferson parish opted for the latter course and constructed a plan for supporting Terrytown with the same public funds that it would have otherwise had to dedicate and expend in furtherance of a new municipal fire department.

In order for the Parish of Jefferson to adopt and begin maintaining Terrytown as its own fire fighting agency, a legal vehicle was necessary through which public funds could be applied to this endeavor. To this end, a fire protection contract was developed and entered into by Terrytown and Jefferson Parish's Fire Protection District No. 5. This contract clarifies the services to be provided and the conditions under which they are to be provided. Moreover, again considering that fire protection and prevention are

sovereign functions, the contract makes it unequivocally clear that the Parish has the right to provide for fire protection differently at any time it chooses. Paragraph 8 of the agreement between Terrytown and the Parish addresses this point and specifies without equivocation that Terrytown can be replaced by a fully paid department under Parish jurisdiction at any time.

The contract between Terrytown and the Parish is nothing more than an agency agreement through which Terrytown acts as the Parish's extension in providing fire protection services to citizens. Although it is true that Terrytown's officers are not officers of either Jefferson Parish or of Fire Protection District No. 5, the implication drawn from this by petitioner to the effect that there is no public accountability is false and ignores reality. As stated, Jefferson Parish has the authority, in its sole discretion and at its will, to put Terrytown out of the fire fighting business whenever it wishes to do so. Terrytown has no right to fight fires or provide public service. There can be no greater catalyst for accountability than this.

The relationship between the Parish of Jefferson, as governing authority of Fire Protection District No. 5, and Terrytown is one in which the Fire Protection District "maintains" the volunteer company in performing its sovereign function of extending fire protection services to the public. This is precisely the manner in which the Louisiana State Legislature viewed the relationship between fire protection districts and volunteer companies when it enacted legislation providing supplemental pay for firemen from the state budget. The purpose of the supplementary pay law is set forth at Louisiana Revised Statute 33:2001 as follows:

This law is enacted by the Legislature in the exer-

> cise of the police power of the State, to promote the public welfare and safety, by providing better protection from fire and other conflagrations.

The benefits provided by this legislation in Louisiana Revised Statute 33:2002 are stated to be

> in addition to the compensation now paid by any municipality, parish or *fire protection district maintaining a fire department.* . . . (Emphasis added.)

At all times, employees of Terrytown have been recipients of supplemental pay from the State of Louisiana under the provisions of this statute. As such, they have been considered as employees of a "fire protection district maintaining a fire department." The statute goes on to refer to such volunteer companies as "fire protection district fire departments."

The entitlement of Terrytown firemen to State supplemental pay under this legislation is fully consonant with the fact that the Terrytown department is *the* department of Fire Protection District No. 5. The long and short of it is that Terrytown has such a symbiotic relationship with the Parish, both from a financial and control standpoint, it cannot be considered as anything other than Jefferson Parish's fire department or as its sole agent engaged in fire protection and suppression activities.

Since the 7(k) exemption applies to "public agencies" engaged in fire protection activities, the courts below focused their attention on the definition of public agency which is provided in Section 3(x) of the Act. After carefully reviewing the statutory language of Section 3(x), the Fifth

Circuit affirmed the district court and held that Terrytown indeed fell within the FLSA definitional framework of public agency established by Congress.

What is petitioner's basis for claiming that the courts below were in error? Three principal claims can be distilled from petitioner's argument: (1) that the Fifth Circuit rejected what petitioner refers to as the Secretary of Labor's "litmus test. . .in interpreting Section 3(x)"; (2) that the Fifth Circuit repudiated the decision of this Court in *NLRB v. Utility District of Hawkins County, Tennessee,* 402 US 600 (1971); (3) that the decision of the Fifth Circuit has revived a "governmental function" test which will dilute employee benefits and wreak labor relations havoc on a national scale. Each of these claims will be treated separately.

First, the Secretary's 'litmus test", so heavily relied upon by petitioner, focuses on the basic tenants of what constitutes a "political subdivision" under the National Labor Relations Act. Under the NLRA, the right to organize and collectively bargain are at issue and, for reasons which have been articulated time and time again throughout years of debate, "political subdivisions" are completely exempt. Yet despite their exemption from coverage under the NLRA, Congress placed political subdivisions under the FLSA umbrella through the 1974 FLSA amendments. The FLSA has goals and remedial purposes which are entirely different than those underpinning the NLRA. For this reason, if for no other, the definitional section of one act should not be transposed to the other in the interest of some misconceived need for consistency.

Additionally, for other obvious reasons, petitioner is completely off base when he claims that the Fifth Circuit rejected the Secretary of Labor's political subdivision "lit-

mus test." What the Fifth Circuit did was recognize that the "political subdivision" test was irrelevant to a case in which the issue is whether Terrytown, under the specific language of the Fair Labor Standards Act, fits the definition of ". . .any agency of. . .a political subdivision of a state." As the district court pointed out:

> . . .[I]t is clear from the definition contained in the act itself that an "agency of a political subdivision" does not include only those entities which meet the criteria of "political subdivision". If Congress had intended such a narrow interpretation, it would not have included both phrases in its definition of a public agency. (PA, 11.)[4]

Petitioner suggests that this Court should consider the deference generally afforded the Secretary of Labor in her enforcement of the FLSA. There is no argument that the Secretary of Labor should be generally afforded deference; but again the point here is not one of whether deference should be afforded but whether the Secretary's erroneous application of the "political subdivision" test to the broader public agency criteria of the FLSA should be allowed to stand. If deference were to be blindly extended, there would be no need for the courts to consider cases arising under the Fair Labor Standards Act in which the Secretary had espoused a particular position. The fact of the matter is that the Secretary's pronunciations on labor law are not infallible.

Petitioner has been relentless in his effort to drive

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[4] Cites to the Appendix contained in the same volume as Petitioner's writ application will be denoted throughout as "PA" with page number(s) following a comma.

the Court's inquiry with a "political subdivision" test. In his writ application, petitioner cites and attaches the opinion letter of the Deputy Administrator of the Wage and Hour Division addressed to the Rockville, Maryland County Attorney's Office regarding whether Montgomery county Volunteer Fire and Rescue Departments qualify as public agencies within the meaning of Section 3(x) of the Fair Labor Standards Act. (PA, 16-24.)

After reciting the facts regarding the relationship between these volunteer organizations and the county, the Deputy Administrator flatly concluded that in his opinion the term "public agency" in Section 3(x) of the Act means a "political subdivision."[5] Later in his opinion, the Deputy Administrator again misses the mark when he states: ". . . the government funding of an entity, standing alone, does not render that entity a *political subdivision* of a state. Nor does substantial state regulation create a *political subdivision*. . ." (Emphasis added.)

In the final analysis, the Secretary's Administrator concludes that the Rockville volunteer organizations are not " political subdivisions, " a finding with which no one could disagree. But the Deputy Administrator's finding is the correct answer to the wrong question.

The Deputy Administrator's error possibly stems from nothing more than an incomplete or careless reading of Section 3(x) of the Act. As the Fifth Circuit suggested, Section 3(x) is ". . .less than a model of statutory drafting." (PA, 3.) Along this line, the Fifth Circuit took the time to

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[5] The Deputy Administrator states in his letter:

> "Under Section 3(x) of the Act, *public agency means* 'the government of a state or *political subdivision* thereof. . .' " (Emphasis added.) (PA. 18.)

carefully parse Section 3(x) in its opinion in order to clarify that Congress had established four general categories of public agency under the Act. In the words of the Fifth Circuit:

> "Public agency" means:
>
> [1.] the Government of the United States;
>
> [2.] the government of
>
> [a] a State or
>
> [b] political subdivision [of a state]
>
> or
>
> [3.] any agency of
>
> [a] the United States. . .,
>
> [b] a State, or
>
> [c] a political subdivision of a state;
>
> or
>
> [4.] any interstate governmental agency. (PA, 4.)

It was through this careful and literal reading of the statute that the Fifth Circuit reached what it considered to be "the relevant inquiry." As the court stated:

> When the section is viewed in this light, it becomes clear that the relevant inquiry here is whether the Terrytown Fifth District Volunteer Fire Department, Inc. is an "agency of a political subdivision of a state." (PA, 4.)

Although petitioner suggests that the Fifth Circuit did not point out any error on the part of the Secretary of Labor, it is implicit in the painstaking fashion in which the Fifth Circuit draws the relevant inquiry that petitioner and the Secretary have proceeded on the basis of an irrelevant inquiry. The Fifth Circuit made it clear that the correct inquiry under the FLSA is much broader than merely what constitutes a political subdivision.[6]

Petitioner's second principal claim of error is based on his assertion that the Fifth Circuit "has effectively repudiated" this Court's holding in *NLRB v. Utility District of Hawkins County, Tennessee,* 402 US 600 (1971). In *Hawkins,* the court defined a political subdivision under the National Labor Relations Act as an entity that is either: (1) created by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. Again, if the inquiry were one of whether or not Terrytown is a "political subdivision", the political subdivision criteria set forth by this Court in *Hawkins* should be applied. But that is not the inquiry raised by the operative language of the FLSA. The key language of the FLSA, unlike that of the NLRA, exempts not only ". . .a state or political subdivision thereof. . ." but also ". . .any agency of. . .a political subdivision of a state."[7]

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[6] As the Fifth Circuit pointed out in its footnote 1:

> . . .the primary dispute has been whether the narrowest category provided for in Section 3(x) "political subdivision" is "political subdivision of a state" *or* "agency of a political subdivision of a state." (Emphasis added.)

[7] Both Congress and the courts have routinely given the term "public agency" broader interpretation than that of

In *Conway v. Tacoma Park Volunteer Fire Department, Inc.*, 666 F.Supp. 786 (M.D.Md. 1987), appeal dismissed, 838 F.2d 465 (4th Cir. 1988), the district court also missed the issue. Applying *Hawkins*, the district court in *Conway* proceeded to inquire whether or not the Tacoma Park Volunteer Fire Department, a non-profit volunteer fire company, was a "political subdivision". There is no doubt that the Tacoma Park Volunteer Fire Department is not a political subdivision. Although it was not necessary for the Fifth Circuit to review or disturb the factual finding of the *Conway* court, there is no disagreement that *Conway* proceeded on an erroneous legal basis.

Petitioner's third principal claim is that Supreme Court review is merited in this case because the Fifth Circuit has revived a "governmental function" test which will dilute employee benefits and wreak labor relations havoc on a national scale. It is respectfully submitted that the power and scope of the Terrytown decision is overly dramatized by petitioner in his writ request. The fact of the matter is that the Fair Labor Standards Act permits a very limited exemption applicable solely to "public agencies" engaged in fire protection and law enforcement activities.

Would petitioner have the courts disregard this special exemption created by Congress? If the courts are not to disregard it, obviously it is for the courts to determine whether or not a particular entity qualifies for the

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Footnote 7 continued.

"political subdivision." See Law Enforcement Assistance Administration Act, 42 USC § 3791(a)(6); Juvenile Justice and Delinquency Prevention Act, 42 USC § 5603(11); Drug Abuse Education and Prevention Act, 42 USC § 11851(9); Boulder Canyon Project Act, 43 USC § 617(k); Voting Rights Act, 42 USC § 1973(L)(C)(2); Flood Control Act, 33 USC § 701(n)(5)(c).

exemption. To suggest that this is tantamount to broadly reviving the "governmental functions" test set forth in *National League of Cities v. Usery*, 426 US 833 (1976), and "abandoned" by the Count in *Garcia v. Samta*, 469 US 528 (1985), is absurd.

First, the issue in the present case is local in scope and has nothing to do with *National League of Cities* or the principles of law on which it was based. Second, *Garcia* does not stand for the proposition that courts are somehow forbidden to analyze or consider governmental functions irrespective of the issue they are required to decide.[8]

Third, the applicability of the FLSA to public and governmental entities is no longer in question, and the Fifth Circuit has not remotely suggested otherwise. Nor can the Fifth Circuit's opinion in *Terrytown* be construed as a retrenchment on this point. Political subdivisions an all of their departments and agencies are subject to the FLSA. The case here is simply different in that it deals with a singular exemption, in the limited context of fire protection services which gives rise to a narrow inquiry, to-wit, whether a non-profit entity performing a traditional sovereign function, funded by the public through tax millage, and based on the peculiar facts of its relationship with a political subdivision, qualifies for a special exemption. It would be difficult for the most astute alarmist to find labor chaos in such a narrow inquiry.

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[8] This Court itself has analyzed and considered what constitutes a traditional governmental function in at least three post-*Garcia* cases: *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 US 522, 107 S.Ct. 2971, 97 L.Ed. 2d 427 (1987); *Quincy West v. Samuel Athins*, 487 US 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Tulsa Professional Collection Services, Inc. v. Pope, 485 US 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).*

CONCLUSION

The ultimate cost for fire protection services is borne by the public for the public, whether those services are provided by government through fire protection districts and volunteer companies or through direct hire municipal fire departments. Under petitioner's theory, if Jefferson Parish wishes to take advantage of the Section 7(k) exemption, responsible as it is for administering public funds and obtaining the best fire protection possible for the tax dollars available, it must abrogate and sever its relationship with Terrytown and form a new direct hire fire department. When Congress passed the 1974 amendments and reasoned that a "tour of duty" exemption for fire and law enforcement services was required to avoid local fiscal hardship, can it reasonably be concluded that, at that point, Congress intended for every local government providing fire protection to its citizens through publicly maintained and funded volunteer companies to abrogate its existing organizational scheme in order to come within the "tour of duty" exemption?

As the facts indicate, Terrytown is not some kind of a private, specialized fire protection service which sells its expertise to public bodies and others on an ad hoc basis. Terrytown is wholly dependent on public tax millage for its existence. The Terrytown fire fighters are the men who respond at all hours of the day and night to residential and commercial fires, who get cats out of trees and who perform all of the basic, everyday, routine civic fire fighting and fire suppression services which government is obligated to provide for its citizens. Terrytown is clearly a private actor performing a puplic service in the public interest which is undisputably sovereign in nature. As this Court wrote in *Evans v. Newton*, 382 U.S. 296, 299, 86 S.Ct. 486, 489, 806 L.Ed.2d 792 (1966):

> ...when private individuals or groups are endowed by the state with powers or functions governmental in nature, *they become agencies or instrumentalities of the state....* (Emphasis added.)

In crafting the Section 7(k) exemption, the congressional House and Senate conferees cited what they consider the "uniqueness" of the fire fighting services.[9] That "uniqueness" is the same whether the government is providing fire fighting service through direct hires, publicly funded, or on a contractual basis with a fire fighting organization, publicly funded as well. Both perform the same service, in the same manner, for the same citizenry. Both are at society's beck and call, at any time of the day or night, to fight fires. There is no basis, other than that of serving and maintaining a purely technical or artificial distinction, for treating them differently under Section 7(k).

For all of these reasons, petitioner's application for writ of certiorari should be denied.

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[9] *"Legislative History of the Fair Labor Standards Amendments of 1974;* Subcommittee on Labor, Volume II (1976) and Joint Explanatory Statement of the Committee of Conference contained therein.